(3)

No. 04-132

Supreme Court, U.S.
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

JOHN RODNEY McRAE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT OF INDIGENCY

* BRIEF IN OPPOSITION *

CERTIFICATE OF SERVICE

SUBMITTED BY:
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_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, JOHN RODNEY McRAE, who is indigent, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari to the Michigan Supreme Court without prepayment of costs, and to proceed *in forma pauperis* pursuant to rule 39.

The Respondent's affidavit in support of this application is attached hereto.

STATE APPELLATE DEFENDER OFFICE

Counsel for Respondent

BY: _____

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645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: November 18, 2004

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-vs-

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_____/

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL *IN FORMA PAUPERIS*

Affidavit in Support of Motion
I swear or affirm under penalty of perjury that, because of my poverty, I cannot pre-pay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury that my answers on this form are true and correct. (28 U.S.C. §1746; 18 U.S.C. §1621.)

Signed: /s/ John R. McRae Date: 11-01-04

Instructions:
Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

My issue(s) on appeal is/are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the

monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months	Amount expected next month
Employment	$	$
Self-employment	$	$
Income from real property (such as rental income)	$	$
Interest and dividends	$	$
Gifts	$	$
Alimony	$	$
Child Support	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$
Disability (such as social security, insurance payments)	$	$
Unemployment payments	$	$
Public assistance (such as welfare)	$	$
Other (specify):	$	$
Total monthly income:	$ -0-	$ -0-

IMPRISONED

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
Disabled	Imprisoned for	More Than	
10	years		

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or deductions.)

Employer	Address	Dates of	Gross
Disabled			

		employment	monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. How much cash do you and your spouse have? $ -0-

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

ZERO

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

NONE

	Value
Home	$_____
Other real estate	$_____
Motor vehicle #1	$_____ Make/year:_____model:_____reg.#_____
Motor vehicle #2	$_____ Make/year:_____model:_____reg.#_____
Other assets	$_____
	$_____
	$_____
	$_____

6. State every person, business or organization owing you or your spouse money, and the amount owed.

Person owing you	Amount owed to you	Amount owed to

NONE

or your spouse money		your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	NO ONE	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$_____	$_____
Are real-estate taxes included?	____ Yes ____ No	
Is property insurance included?	____ Yes ____ No	
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not included in motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in Mortgage payments	$_____	$_____
Homeowner's or renter's	$_____	$_____

Life	$	$
Health	$	$
Motor vehicle	$	$
Other:_____		
Taxes (not deducted from wages or included in Mortgage payments) (specify):_____	$	$
Installment payments	$	$
Motor vehicle	$	$
Credit card (name)_____	$	$
Department store _____	$	$
Other:_____	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify)_____	$	$
Total monthly expenses:	$	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months? _____ Yes __X__ No
If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? _____ Yes __X__ No
If yes, how much? $_____
If yes, state the attorney's name, address and telephone number:

_____

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form? _____ Yes __X__ No
If yes, how much? $_____
If yes, state the person's name, address and telephone number:

_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

I am completely without funds, disabled, unemployed and have been a pauper for over 10 years

13. State the address of your legal residence. Hill County Jail

Your daytime phone number: ( ) _____

Your age: _____ Your years of schooling: _____

Your social security number: _____

Havre, MT

59525

Attn: Paul Pemberton

DATE 11/17/04

INMATE ACCOUNTING
INMATE ACCOUNT RECORD

LEMS ID# 18373 MCRAE, JOHN RODNEY
LOCAL ID#

TRANS DATE	OFFICER	DESCRIPTION	DISBURSE MENTS	DEPOSITS	INMATE BALANCE
8/02/04	TESSNER, JAKE	BEGINNING BALANCE		.00	.00

BEST AVAILABLE COPY

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Attorneys for Respondent John Rodney McRae

REASONS FOR DENYING THE WRIT

There Are No Compelling Reasons to Review the Decision of the Michigan Supreme Court.

A. MR. MCRAE'S RE-TRIAL IS SCHEDULED TO COMMENCE IN JANUARY 2005.

Several months ago the Michigan Department of Corrections released Mr. McRae to the Clare County Jail in anticipation of his re-trial. His case is in an active pre-trial posture with all motions due by Friday November 19, 2004 - the same due date as this brief in opposition to the petition for writ of certiorari. Mr. McRae's trial is scheduled to begin in January, 2005. Petitioner's Counsel has yet to seek a stay of the proceedings in the trial court and has not indicated the need for any type of expedited review by this Court of the instant petition.[1] Assuming for purposes of argument that the trial will begin as planned, any action by this Court may very well be an unwarranted and unnecessary waste of this Court's precious time and resources - regardless of the outcome at the re-trial. Therefore, certiorari should be denied.

B. THE MICHIGAN SUPREME COURT PROPERLY DETERMINED THAT MCRAE'S STATEMENT TO THE OFFICER WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

The question presented in the Petition turns on whether Dean Heintzelman was acting as a state agent at the time he went to question Mr. McRae at the Clare County Jail. Petitioner largely takes issue with the Michigan Supreme Court's purported failure to follow the criteria set forth in other federal circuit and state court decisions that have addressed this subject. *See e.g., United States v. Gaday*, 894 F.2d 1307 (11th Cir. 1990) and *Cook v. Georgia*, 270 Georgia 820

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[1] Respondent is not suggesting that such expedited review is warranted given that the decision in this case is not nationally significant. *Cf. Bush v. Gore*, 531 U.S. 98 (2000) (implicating the elected president of the United States) or *U.S. v. Booker* (Docket No. 04-104) and *U.S. v. Fanfan* (Docket No. 04-105) (regarding this Court's recent decision in *Blakely v. Washington*, 124 S.Ct. 531 (June 24, 2004)).

(1999). It is Respondent's position that the Michigan Supreme Court correctly distinguished those cases from the instant matter.

Central to any decision in this case are the undisputed facts that Mr. McRae was arrested for the murder of Randy Laufer in September of 1997, he was appointed counsel, and was held in the maximum security wing of the Clare County jail awaiting a preliminary examination. (Petition at page 4). Mr. McRae indicated to his wife that he would like to see some friends and former neighbors while he was at the jail and such a message was conveyed to Dean Heintzelman. (Petition at page 5). Mr. McRae did not know that Dean Heintzelman was employed by the Sheriff's department. (Michigan Supreme Court Opinion at pages 5a-8a[2]).

In the petition, Dean Heintzelman is characterized as not only Mr. McRae's former neighbor and friend but also "a part-time volunteer, reserve deputy sheriff" presumably in an effort to downplay the fact that Dean Heintzelman was an agent of the Clare County Sheriff's department – the very department that investigated this crime. The state admits in the instant petition that at the time he visited Mr. McRae, Heintzelman was at the jail in connection with his duties, he was in uniform and had a badge displayed, and he asked permission to visit Mr. McRae at 11:00 p.m., after normal business hours. (Petition at page 5). At oral argument in the Michigan Supreme Court, the state conceded that "it was only by virtue of his status as a reserve deputy that Heintzelman was granted direct access to defendant's maximum-security cell, a restricted area where only governmental agents are normally allowed to tread." (Michigan Supreme Court Opinion at page 9a).

Furthermore, Dean Heintzelman was fully aware of the circumstances surrounding Mr. McRae's incarceration when he went to visit him in jail, given that he was called to McRae's

[2] The references are to the appendix of the petition.

former property when Laufer's body was unearthed and "was one of several people assigned to guard the perimeter of the gravesite overnight, until the Michigan State Police forensic evidence team could arrive the next day." (Petition at page 5).

The petition makes Herculean efforts to describe this conversation at the jail between McRae and Heintzelman as a friendly chat between former friends and neighbors. However, the Michigan Supreme Court correctly noted that Dean Heintzelman tried "at least *four separate times* to initiate questioning regarding the investigation". (Michigan Supreme Court opinion at page 13a) (emphasis in original). McRae never waived his right to counsel, but went on to make incriminating statements that the Michigan Supreme Court found to be illegally obtained.

The petition for writ of certiorari suggests that this Court adopt a "bright line test" to determine whether a person is a state actor at the time of such questioning. It is Respondent's position that the Michigan Supreme Court's decision is in line with the authority that is urged in the petition (at page 18) and in fact does not even present a close question for this Court.

Focusing on the "purpose of the visit", a position taken by Petitioner and detailed by the Eleventh Circuit in *United States v. Gaddy*, *supra* at 1311, the Michigan Supreme Court affirmatively found that Dean Heintzelman was part of the police team present for the recovery of the victim's body from Mr. McRae's former residence. Furthermore, the Court found that at the time of the questioning Heintzelman was not acting out of any concern for McRae's welfare. (Michigan Supreme Court Opinion at page 10a). The Michigan Supreme Court distinguished the absence of state action in *United States v. Gaddy*, *supra* (involving the defendant's statements to his police-officer aunt), and *Cook v. Georgia*, *supra* (involving the defendant's statements to his FBI-agent father) largely because McRae and Heintzelman were not very close. (Michigan Supreme Court Opinion at page 10a-11a, and 11a n.10). That decision is sound.

Heintzelman's interrogation violated Mr. McRae's constitutional rights. No amount of clever argument can disguise or dress up what Heintzelman did. By pushing Mr. McRae to admit guilt, purporting to relate what authorities believed about the circumstances of the crime and again seeking a confession, reporting the conversation to his superior officer, and testifying against Mr. McRae in court, Heintzelman was not acting as a friend. Rather, he was most decidedly placing Mr. McRae into a "critical confrontation[] with his adversary." *Michigan v. Jackson*, 475 US 625, 630 (1986) (quoting *United States v. Gouveia*, 467 US 180, 189 (1984)). The statements extracted during that interrogation were elicited at Heintzelman's instigation and were inadmissible at trial.

Petitioner's argument that the error was harmless is inherently suspicious. As this Court stated in *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) "[a] confession is like no other evidence." In a circumstantial case like McRae's, it was incumbent on the trial court to proceed with caution:

> "[T]he risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless." *Id.*

Though this case does not involve a confession *per se*, the statements made by McRae are also not appropriately characterized as "ambiguous" by Petitioner. (Petition at page 29). Aside from circumstantial evidence of McRae's guilt, the other "evidence" against him at trial was a jailhouse confession and evidence of a prior crime that McRae committed when he was fifteen years old. Without the statements McRae made to Dean Heintzelman, the credibility of the witnesses and evidence is marginal at best. Thus, the error was not harmless.

C. THERE ARE NO OTHER REASONS FOR GRANTING THE WRIT.

This is not a close case and it truly is not debatable among reasonable jurists. Assuming for the sake of argument alone that the Michigan Supreme Court failed to clearly articulate a rule for determining what action constitutes state action, the result would still be the same and be in line with the cases urged by the Petitioner. This Court will rarely find a compelling reason for granting certiorari in erroneous factual findings or the misapplication of a properly stated rule of law. Supreme Court Rule 10.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari must be denied.

STATE APPELLATE DEFENDER OFFICE

Counsel for Respondent

BY: _____

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